SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903

No. 212

J. L. HOWARD, ALIAS FRANK THOMPSON, ALIAS [illegible] ALIAS GONEZ BONO, AND H. D. HAWLEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED APRIL 20, 1903.

(16,512.)

(18,512.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 313.

J. L. HOWARD, ALIAS FRANK THOMPSON; A. L. DALY, ALIAS GONEZ BONO, AND H. D. HAWLEY, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

	Original.	Print.
Petition for writ of error	*a*	1
Order granting writ of error	*h*	5
Assignment of errors	*i*	6
Writ of error	*m*	8
Citation and service	*o*	9
Bond on writ of error	*p*	9
Indictment filed in superior court	*q*	10
Defendants' statement of case on appeal (omitted in printing, per stipulation; see side page 146)	1	—
Docket entries	134	13
Motion to reduce amount of bonds	134	14
Opinion	135	14
Concurring opinion of Montgomery, J.	137	18
Dissenting opinion of Douglas, J.	137	18
Dissenting opinion of Furches, C. J.	143	29
Judgment	144	30
Clerk's certificate	145	30
Stipulation to omit "statement of case on appeal" in printing record, &c.	146	30

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 29, 1902.

a In the Supreme Court of North Carolina, October Term, 1901.

J. L. HOWARD, alias FRANK THOMPSON; A. L. DALEY, alias GONEZ BONO, and H. D. Hawley
vs.
THE STATE OF NORTH CAROLINA.

To the honorable the chief justice of the supreme court of North Carolina:

Your petitioners, J. L. Howard, A. L. Daley and H. D. Hawley above named respectfully show unto this honorable court that heretofore on to wit, at the June term 1901 of the superior court of Guilford county, North Carolina, your petitioners were indicted for a criminal conspiracy, which said indictment was in words and figures as follows, that is to say:

Superior Court, June Term, A. D. 1901.

"STATE OF NORTH CAROLINA,
Guilford County.

"The jurors for the State, upon their oath present, that J. L. Howard, alias Frank Thompson, late of the county of Guilford, on the 22nd day of March, 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest practices, in secrecy, with deceit and intent to defraud, among themselves unlawfully, wilfully, fraudulently and deceitfully did combine, conspire, confederate and agree together by divers false pretenses and subtle means and devises, to obtain from one Paul
b Garrett, large sums of money, and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State."

Your petitioners further aver that on to wit, in June, 1901, said case was called for trial, and before a petit jury duly empanelled, petitioners went to trial, upon a plea of not guilty; his honor Judge Council, presiding; and evidence was offered on behalf of the State of North Carolina, and at the conclusion of the evidence offered by the State, the defendants below offering no evidence in their behalf, the case went to said jury upon a written charge by said judge; that thereafter said jury found all the defendants guilty, as charged, of said conspiracy; and that thereafter the said judge sentenced the said Howard to a term of ten years in the penitentiary of the State of North Carolina, and the said Hawley to a term of ten years in said penitentiary, and the said Daley to a term of seven years in said penitentiary.

Your petitioners further aver that thereafter, under the statutes of the State of North Carolina, they prayed their appeal to the supreme court of the said State, praying in addition thereto that they

be allowed to prosecute their said appeal as paupers; both of which said prayers were granted; and that thereupon and thereafter, in pursuance of said appeal, said case came on to be heard in said supreme court, and was there duly argued on behalf of the State and of all these petitioners.

Your petitioners further aver that after said hearing as aforesaid in said supreme court of said State, said supreme court took said cases under advisement, and that thereafter on to wit, the 3rd day of December, A. D. 1901, rendered its opinion affirming the decision of said superior court, and affirming the sentence of said superior court that said defendants, Howard, Daley and Hawley should serve their said sentences of ten, ten and seven years respectively, in the penitentiary of the State of North Carolina.

Your petitioners further aver that the said decision of the said superior court and the said judgment rendered therein and the judgment rendered by the supreme court of the said State of North Carolina in affirmance of the judgment of said superior court, were and are and each of them was and is in contravention of the express provisions of the Constitution of the United States in this, that is to say:

1st. The indictment, arrest, imprisonment, conviction, sentence and judgment in the superior court of Guilford county and the affirmance by the supreme court of the State of North Carolina of said judgment of said Guilford county superior court were and are not due process of law in this, that is to say:

(*a.*) The indictment charges a conspiracy to cheat and defraud, which was not and is not an offence under the statutes and code of North Carolina.

(*b.*) No such offense as charged was known to the common law of England, prior to the Declaration of Independence of July 4th, 1776, which said common law the said State of North Carolina adopted as a part of the law of said State.

(*c.*) No such offense is known to the common law of North Carolina as adopted from England and as interpreted by the courts of said State.

(*d.*) The criminal code of North Carolina assumes to cover all criminal offenses and to exclude all acts other than those described by its terms as being criminal; and under the terms of such code no such crime as described and set forth in said indictment is justiciable or punishable by the courts of said State under said code.

(*e.*) The legislature of the State of North Carolina has expressly repealed the common law of England and the ancient statutes relating to conspiracy, and has substituted therefor nothing touching the offense described in the indictment in this case; and such indictment charges no offense known to the law, statutory or other of said State.

II.

Your petitioners further aver that by reason of the foregoing the said superior court of Guilford county was without jurisdiction to try your petitioners or to impose a sentence upon them, and said

supreme court of North Carolina was without jurisdiction to affirm said sentence.

III.

Your petitioners further aver that the sentence of the Guilford county superior court and the affirmance thereof by said supreme court were contrary to the 14th amendment of the Constitution of the United States in this, that said sentence and said affirmance were and are and each of them was and is not due process of law as said term is used in said 14th amendment.

Your petitioners further aver that all of said points above set forth and hereinafter mentioned were raised in said Guilford county superior court and in said supreme court, as will more fully appear by the record in said cause; and that said superior court and said supreme court each of them refused to consider and ignored constitutional questions. And petitioners aver that said supreme court was the highest court in said State to which said cause could be submitted, and that petitioners have exhausted their remedies in said court.

IV.

(*a.*) Your petitioners further aver that the sentences in the judgment abov- set forth are cruel and unusual, and by said sentences the said Guilford county superior court, and in affirming the same the said supreme court, have violated the 14th amendment of the Constitution of the United States in this, that said courts have denied your petitioners the equal protection of the law as citizens of the United States and as citizens of a State different from the State of North Carolina; and have denied your petitioners the equal protection of the laws required by the Constitution of the United States to be extended to the citizens of the State of North Carolina.

(*b.*) Your petitioners further aver that the sentences in the hearings above set forth and the punishments inflicted and imposed by the said superior court of Guilford county, North Carolina, and affirmed by the said supreme court of North Carolina, for the alleged offense of which your petitioners were unlawfully convicted, were and are and each of them was and is unlawful, cruel and unusual, and in violation of article 1, section 14, of the constitution of North Carolina, and of art. 8. of the Constitution of the United States.

(*c.*) Your petitioners further aver that by the judgment of the said Guilford county superior court and the affirmance thereof by the supreme court of said State the said State of North Carolina has discriminated against your petitioners and has adjudged as against them a punishment far more severe than said State of North Carolina for the like alleged offense has ever imposed upon citizens of its own State. And further said sentences are wholly unauthorized by the laws of said State.

V.

Your petitioners further aver that the judgment of said Guilford court affirmed by said supreme court is a judgment *ex post facto* and void under the Constitution of the United States.

VI.

That said Guilford superior court in its written charge to the jury in said cause violated the said 14th amendment to the Constitution of the United States in this: that in the face of the law of North Carolina, the judge of said superior court neglected and refused to charge said jury that in said State defendants in all criminal
f cases w-re then entitled to a presumption of innocence in their favor, which said presumption exists and remains until overcome by positive and affirmative evidence of guilt. That by section 413 of the Code of North Carolina, the trial judge is required to put to the jury any and every hypothesis of fact embraced in instructions offered by defendants and to explain to such jury that such hypothesis is supported by the evidence and the law, or else to state to the jury wherein such hypothesis is not sustained by the law or the facts, either or both; but though defendants asked in a series of instructions numbered from 3 to 13 inclusive, the court failed and refused to instruct the jury as to the hypothesis set out in said instructions, though said instructions so prayed embodied a state of fact which the evidence adduced tended to prove. That in violation of said section in its charge, the trial court singled out the prosecuting witness, Garrett, and distinctly commended him and his acts to said jury.

That in violation of the law of said State, said trial judge intimated to said jury his belief that the defendants were guilty, by stating in his said charge that if said defendants felt themselves aggrieved by the rulings and charge of said court, they might appeal to the supreme court.

The said supreme court, in its opinion, has neglected and refused to pas- upon any of the said questions in this paragraph noted, though each and every one of them was distinctly raised in the record and earnestly pressed in the printed brief submitted; and thereby said supreme court has discriminated against these petitioners and has denied to them the equal protection of the laws of North Carolina in violation of the 14th amendment to the Constitution of the United States.

VII.

Your petitioners further show that on the 20th day of March,
g 1901, they were in the said county of Guilford arrested and taken into custody without warrant and upon preliminary examination before a magistrate were held to the June term of the said Guilford superior court, without bail where they remained until their conviction and sentence aforesaid, when the said supreme court in violation of the Constitution of the United States required of your petitioner Howard a bail of $5,000 and of your petitioner Hawley $5,000 and of your petitioner Daley a bail of $3,000 all of

which was exorbitant and excessive, and in default of ability to give the same your said petitioners and each of them have been from thence hitherto and now are confined in the pen-tentiary of North Carolina.

(c.) Your petitioners further aver that their imprisonment in the pen-tentiary of North Carolina is unauthorized and unlawful, and further for the reason that the appeal of your petitioners from the judgment and sentence of the superior court of Guilford county vacated the judgment and sentence and that your petitioners have never been resentenced or adjudged to undergo said punishment or sentence or any other punishment or sentence by any court of the State of North Carolina; on the contrary, your petitioners aver and show unto your honor that the said judgment of the superior court of Guilford county was affirmed by the said supreme court in the afternoon of the third day of December, 1901, and that the sheriff of Guilford county on the 13th day of December, 1901, without the order or mandate of the said supreme court or the judgment and resentence of them by the said superior court of said Guilford county, carried your petitioners to the pen-tentiary of said State where they now remain, all of which your petitioner avers was illegal and was and is in direct violation of the law of said State and of the 14th amendment of the Constitution of the United States.

Wherefore your petitioners pray that a writ of error in due form issue by this honorable court returnable into the Supreme Court of the United States and for a citation and supersedeas; and that pending the hearing and disposition of said writ of error in said Supreme Court of the United States your petitioners may be allowed their liberty on terms of reasonable bail.

And your petitioners will ever pray.

h

J. L. HOWARD,
H. D. HAWLEY,
A. L. DALEY, *Petitioners*,
By L. A. GILMORE,
FRANK P. BLAIR, AND
BYNUM & BYNUM,
Their Attorneys.

STATE OF NORTH CAROLINA, *Supreme Court,* } *ss:*

Let the writ of error issue upon the execution of a bond by the plaintiffs in error to the State of North Carolina, in the sum of five hundred dollars; said bond not to act as a supersedeas.

Dated first day of March 1902.

DAVID M. FURCHES,
Chief Justice.

[Endorsed:] Petition.

i In the Supreme Court of the United States.

J. L. HOWARD, A. L. DALEY, and H. D. Hawley, Plaintiffs in Error,
vs.
THE STATE OF NORTH CAROLINA, Defendant in Error.
} Error to the Supreme Court of North Carolina.

Assignments of Error.

Come now J. L. Howard, A. L. Daley and H. D. Hawley, the above-named plaintiffs in error by Leslie A. Gilmore and Frank P. Blair, their attorneys, and respectfully show to this honorable court that by the proceedings and judgment of the supreme court of the State of North Carolina in the above-entitled cause, they feel themselves aggrieved, and they assign error in such proceedings and judgment as follows:

1st. The judgment of said supreme court of North Carolina is repugnant to the 14th amendment of the Constitution of the United States, and these plaintiffs in error have been convicted and sentenced by the courts of said State without due process of law, in this:

(*a.*) That a conspiracy to cheat and defraud is not a crime under the statutes and code of said State.

(*b.*) No such offense as charged is known to the common
j law of *of* North Carolina.

(*c.*) The criminal code of said State assumes to cover all crimes and to exclude from punishment all acts other than those described as criminal by said code; and that under the terms of said code there is no such offense as that set out in said indictment.

(*d.*) Such indictment charges no offense known to the law, statutory or other, in said State.

2nd. The punishment adjudged by the superior court of Guilford county and affirmed by the supreme court of said State in said cause was cruel and unusual under the constitution and laws of said State, and by said judgment and said affirmance, plaintiffs in error have been denied the equal protection of the laws of said State.

3rd. Said punishment was cruel and unusual within the meaning of the 8th amendment of the Constitution of the United States.

4th. Said punishment was wholly unauthorized by the laws of said State, and was hence contrary to said 14th amendment.

5th. The judgment of said Guilford superior court and the affirmance thereof by said supreme court, were and are *ex pos- facto* and void; in this, that they have increased, without warrant of law, the punishment theretofore given in said State for offenses such as that attempted to be set out in said indictment.

6th. That said Guilford superior court in its written charge to the jury in said cause violated the said 14th amendment to the Constitution of the United States in this that in the face of the law of North Carolina, the judge of said superior court neglected and refused to charge said jury that in said State defendants in all criminal cases

were then entitled to a presumption of innocence in their favor, which said presumption exists and remains until overcome by positive and affirmative evidence of guilt. That by section 413 of the Code of North Carolina, the trial judge is required to put to the jury any and every hypothesis of fact embraced in instructions offered by defendants and to explain to said jury that such hypothesis is supported by the evidence and the law, or else to state to the jury wherein such hypothesis is not sustained by the law or the facts, either or both; but though defendants asked, in a series of instructions numbered from 3 to 13 inclusive, the court failed and refused to instruct the jury as to the hypothesis set out in said instructions so prayed though said instructions embodied a state of fact which the evidence adduced tended to prove. That in violation of said section 413 in its charge, the trial court singled out the prosecuting witness, Garrett, and distinctly commended him and his acts to said jury.

That in violation of the law of said State, said trial judge intimated to said jury his belief that the defendants were guilty, by stating in his charge that if said defendants felt themselves aggrieved by the rulings and charge of said court, they might appeal to the supreme court.

The said supreme court, in its opinion, has neglected and refused to pass upon any of the said questions in this paragraph noted, though each and every of them was distinctly raised in the record and earnestly pressed in the printed brief submitted; and thereby said supreme court has discriminated against these petitioners and has denied them the equal protection of the laws of North Carolina in violation of the said 14th amendment to the Constitution of the United States.

7th. The denial of bail before indictment found, and the fixing of bail pending appeal at an aggregate of $13,000, was in violation of the 8th amendment of the Constitution of the United States.

Wherefore plaintiffs pray this court to examine and correct said errors and to reverse, set aside and annul the judgment of said supreme court and the judgment of said superior court in said cause.

J. L. HOWARD,
A. L. DALEY, AND
H. D. HAWLEY,
Plaintiffs in Error,
By LESLIE A. GILMORE &
FRANK P. BLAIR,
Their Attorneys.

[Endorsed:] Assig. of errors.

m UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Carolina, before you or some of you, being the highest court of law of the said State in which a decision could be had in the said suit between The State of North Carolina, plaintiff, and J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bona; and H. D. Hawley, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of said Constitution, a manifest error hath happened, to the great damage of the said J. L. Howard, A. L. Daly, and H. D. Hawley, as by their petition appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Wash-
n ington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable —— ——, Chief Justice of the United States, the 15th day of March, in the year of our Lord one thousand nine hundred and two.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the United States Circuit Court for the Eastern District of North Carolina.

Allowed by
D. M. FURCHES,
Chief Justice.

Filed in supreme court of North Carolina March 25, 1902.

o UNITED STATES OF AMERICA, *ss:*

To Robert D. Gilmer, attorney general of the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to writ of error filed in the clerk's office of the supreme court of North Carolina, at Raleigh, wherein J. L. Howard, alias Frank Thompson; A. L. Daly, alias Gonez Bono; and H. D. Hawley, are plaintiffs in error and The State of North Carolina is defendant in error, whose attorney general you are, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David M. Furches, chief justice of the supreme court of the State of North Carolina, this the 1st day of March, in the year of our Lord one thousand nine hundred and two.

DAVID M. FURCHES,
Chief Justice of the Supreme Court of the State of North Carolina.

I hereby acknowledge service of the within and foregoing citation and of the writ of error therein mentioned for and on behalf of the defendant in error, The State of North Carolina, this — day of *December*, 1901.

ROBERT D. GILMER,
Attorney General of the State of North Carolina.

Filed in supreme court of North Carolina March 25, 1902.

[Endorsed:] For U. S. Sup. Ct. Citation.

p (Title of Cause.)

Know all men by these presents, that we, J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, as principals, and The American Bonding & Trust Company of Baltimore City, as surety, are held and firmly bound unto the State of North Carolina in the full and just sum of five hundred dollars to be paid to the said State of North Carolina, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this twenty-seventy day of February in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a term of the supreme court of North Carolina in a suit pending in the said supreme court between J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley as defendants, and The State of North Carolina as plaintiff, judgment was rendered against said defendants and the said defendants having prosecuted a writ of error in the Supreme Court of

the United States to reverse the judgment aforesaid and a citation having issued directed to the said State of North Carolina citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the —— 1902.

Now the condition of the above obligation is such that if the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain *to remain* in full force and virtue.

In witness whereof we have hereunto set our hands and seals this twenty-seventh day of February A. D. 1902.

J. L. HOWARD, ALIAS FRANK THOMPSON. [SEAL.]
A. L. DALEY, ALIAS GONEZ BONO. [SEAL.]
H. D. HAWLEY. [SEAL.]
THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY,
By JAS. BOND, *President.*

Attest: EDWIN W. POE, *Assistant Sec.*

Approved this 1st day of March, 1902.

D. M. FURCHES,
Chief Justice Supreme Court of N. C.

q STATE OF NORTH CAROLINA, }
Guilford County. }

Be it remembered that at a regulur term of the superior court begun and held on the 3rd day of June, 1901, at the court-house in Greensbore, N. C., before the Honorable W. B. Councill, judge presiding, the following proceedings were had:

The following were duly drawn, sworn and charged as grand jurors for this term: W. C. Boren, foreman; W. D. Moore, R. L. Hodgin, Alfred Apple, Henry D. Voss, Geo. W. Christopher, T. J. Roach, L. A. Brown, D. C. Aldridge, John C. Sechrest, W. H. Case, Jesse W. Sapp, Lucien W. Smith, E. M. Huffines, J. C. McLean, A. M. Briggs, A. E. Corum, R. H. Crouch.

That the said grand jury returned in open court the following bill of indictment:

STATE OF NORTH CAROLINA:

Superior Court, Guilford County, June Term, A. D. 1901.

The jurors for the State, upon their oaths present, that J. L. Howard, alias Frank Thompson, A. L. Daley alias Gomez Bono, and H. D. Hawley, late of the county of Guilford, on the 22nd day of March A. D. 1901, with force and arms at and in the county aforesaid, being persons of evil minds and dispositions and seeking to get their living by various subtle, fraudulent and dishonest prac-

tices, in secrecy, with deceipt and intent to defraud, among themselves unlawfully, willfully, fraudulently, feloniously, and deceitfully did combine, conspire, confederate and agree by divers false pretences and subtle means and devices, to obtain from one Paul Garrett large sums of money and him the said Paul Garrett to cheat and defraud out of his monies, goods and chattels contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

r Second count. The jurors for the State upon their oaths do further present, that J. L. Howard alias Frank Thompson, A. L. Daley alias Gomez Bono and R. D. Hawley, late of the county of Guilford on the 22nd day of March A. D., 1901, being persons of fraudulent minds and evil dispositions and wickedly devising and intending to rob one Paul Garrett of his monies, goods and chattels, did unlawfully, wickedly and feloniously conspire, combine, confederate and agree together, in and upon one Paul Garrett in the peace of God and of the State then and there being, feloniously to make an assault on him the said Paul Garrett, in bodily fear and danger of his life, then and there feloniously to put, and the monies, goods and chattels of the said Paul Garrett from the person and against the will of the said Paul Garrett, then and there feloniously and fraudulently to steal, take and carry away as by the said J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley had been mutually agreed and undertaken to do, to the evil example of all good citizens and against the peace and dignity of the State.

Third count. The jurors for the State upon their oath do further present, that J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. G. Hawley, late of the county of Guilford, being persons of fraudulent minds and dispositions and wickedly devising and intending to cheat and defraud the said Paul Garrett out of his monies, goods, chattels and property, did on the 20th day of March A. D. 1901, in the county of Guilford aforesaid, feloniously, wickedly and deceitfully combine, conspire, confederate and agree together to cheat and defraud the said Paul Garrett of his monies, goods, chattels and property as aforesaid by the false and deceitful color and pretenses as follows, to wit: By him the said J. L. Howard alias Frank Thompson, pursuant to a conspiricy, confederation and agreement theretofore had and made between him and his co-conspirators above named

s falsely, fraudulently and deceitfully pretending and representing to the said Paul Garrett, that he, the said J. L. Howard, alias Frank Thompson and his associate and confederate, Gonez Bono, alias A. L. Daley, were then and there the owners of and in possession of large blocks of gold as well as the owners of large and valuable mining interests in Arizona which said gold was held by the said Gonez Bono on Buffalo creek near the city of Greensboro, where the said Paul Garrett was then and there taken and the said blocks of metal then and there shown him, when the said J. L. Howard, alias Frank Thompson, pursuant to the conspiracy theretofore had and made, pretended that the said blocks of metal were solid gold 22 karats fine and of the value of many thousands of dol-

lars which they offered to demonstrate by chemical analysis to be made by their said co-conspirator, H. D. Hawley, who was then and there waiting near by in the city of Greensboro with an assayer's outfit to fraudulently and falsely analyze and assay said spurious metal and pronounce it pure gold, thereby aiding his co-conspirators in the execution of this common, fraudulent and felonious design to cheat and defraud the said Paul Garrett, in pursuance of a common conspiracy and confederation had and made by and between the said J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley, and the said J. L. Howard, alias Frank Thompson, then and there sought to dispose of and sell to the said Paul Garrett the said blocks of metal for large sums of money; whereas in truth and in fact the said blocks of metal falsely and fraudulently represented to be gold were not gold but of a cheap and comparatively worthless metal by means of which said false, fraudulent and felonious representation the said J. L. Howard, alias Frank Thompson, A. L. Daley alias Gonez Bono and the said H. D. Hawley sought and attempted to obtain unjustly and unlawfully large sums of money from the said Paul Garrett contrary to the form of the statute in such cases provided and against the peace and dignity of the State.

BROOKS, *Solicitor.*

Endorsed on the back as follows:

"State *vs.* J. L. Howard alias Frank Thompson, A. L. Daley alias Gonez Bono and H. D. Hawley. Indictment conspiracy. Gov. pros. witnesses—Paul Garrett x, A. C. Patterson, W. J. Weatherly x, Garland Daniels x.

Those marked x sworn by the undersigned foreman and examined by the grand jury, and this bill found. A true bill.

W. C. BOREN,
Foreman Grand Jury."

STATE *vs.* A. L. DALEY, alias GONEZ BONO; J. L. Howard, alias Frank Thompson, and H. D. Hawley.	Indictment: Conspiracy.

Motion by defendants to separate witnesses, and the court stated that he would not exclude from the court-room the high sheriff of the county, nor his deputy, nor the principal witness for the prosecution and the court further states that this is a matter discretionary with the court, and considering the high moral character of the witnesses above mentioned, declines the motion.

Defendants except to the remarks of the court.

The remarks of the court were made before jury was passed upon by either State or defendants.

In this case the following jury sworn and empanelled: Frank Barber, B. B. Miles, G. M. Rumley, J. Q. Curtis, W. S. Holt, J. W. Busick, A. M. Farrington, D. M. Glass, S. H. Coltrane, C. H. Fields, W. A. Heath, G. K. Briggs.

J. R. Robinson sworn as officer of the jury.
The jury for their verdict say: Defendants guilty.

STATE
vs.
A. L. DALEY, alias GONEZ BONO; J. L. HOWARD, alias FRANK Thompson, and H. D. Hawley.

Defendants are again brought into court. Motion — defendants to set aside verdict. Motion denied. Motion by defendants for new trial. Motion overruled. Motion in arrest of judg't. Motion denied. Motion of solicitor for judgment. Judgment of the court that the defendant J. L. Howard, alias Frank Thompson be imprisoned in the State penitentiary for the term of ten years. Judgment of the court that the defendant H. D. Hawley be imprisoned in the State penitentiary for the term of ten years. Judgment of the court that the defendant A. L. Daley, alias Gonez Bono be imprisoned in the State penitentiary for the term of seven years.

Defendants except to the judgment as pronounced by the court and appeal to the supreme court. Notice of appeal waived in open court. Appeal bond fixed at the sum of fifty dollars, or otherwise allowed to appeal as the law allows.

By consent defendants allowed fifty days to serve case on appeal, and State allowed thirty days thereafter to accept case on appeal or file counter-case. Bail bond for defendant J. L. Howard alias Frank Thompson fixed by the court at the sum of five thousand dollars. Bail bond for the defendant H. D. Hawley fixed by the court at the sum of five thousand dollars. Bail bond for the defendant A. L. Daley alias Gonez Bono fixed by the court at the sum of three thousand dollars.

v-133 STATE OF NORTH CAROLINA,
Guilford County.

I, Jno. J. Nelson, clerk of the superior court for said county do hereby certify that the foregoing is a true copy of the indictment, trial and judgment in the case State vs. J. L. Howard alias Frank Thompson, A. L. Daley, alias Gonez Bono, and H. D. Hawley, as same appears on record in this office.

Witness my hand and official seal at office in Greensboro, this October 1st, 1901.

JNO. J. NELSON,
Clerk Superior Court.

[OFFICIAL SEAL.]

* * * * * * *

134 (Docket entries: Appeal docketed October 14, 1901. Argued October 22. Opinion delivered by Clark, J. December 3, affirmed. Furches, C. J. and Douglas, J. dissenting. Certificate sent to court below December 11 by special order of this court upon the application of the chairman of the board of commissioners of Guilford county.)

(*Motion of Defendants.*)

Filed October 22, 1901.

In the Supreme Court of North Carolina.

(Title of Cause.)

Appeal from the superior court of Guilford county.

Come now appellants and move the court to reduce the amount of the bonds required by the trial judge for their appearance, pending the result of this appeal, as the same appears fixed on page 106 of the record, at the bottom of page 106 and top of page 107 of the record in said case, to which exception was then duly taken on the ground that it was excessive. To which exception was reserved on page 107.

FRANK P. BLAIR,
L. A. GILMORE,
WM. P. BYNUM, JR.,
Attorneys for Defendants.

135 Case argued by Bynum & Bynum, F. P. Blair, and L. A. Gilmore, for appellants. Att'y Gen. Gilmer for the State.

Opinion.

CLARK, *J.*:

The defendants, J. L. Howard, alias Thompson, Gonez Bono, alias A. L. Daley, and H. D. Hawley, were indicted for a conspiracy to defraud. The indictment was in three counts. At the close of the evidence for the State, the defendants moved the court to require an election by the State upon which count it would rely for conviction. Thereupon the solicitor elected to rely upon the first count, and entered a "*nolle prosequi* as to the second and third counts; these other counts to be referred to as furnishing particulars." Upon this being done, the defendants asked the court to instruct the jury to return a verdict of not guilty, and excepted to the refusal. The defendants introduced no evidence. The three counts were simply a description of the same transaction in different ways, and the joinder was unobjectionable. The court need not, therefore, have required an election. State *v.* Barber, 113 N. C., at page 714, citing State *v.* Morrison, 85 N. C. 561; State *v.* Allen, 107 N. C. 805, State *v.* Harris, 106 N. C. 682, State *v.* Parish, 104 N. C. 679, State *v.* Horan, 61 N. C. 571, 576. The evidence is uncontradicted, and its chief features will be set out by the reporter in the statement of the case. It is almost dramatic in its details, and presents with striking clearness the methods of a fashion of swindling which has doubtless been little practiced in this State. The indictment in full will also be copied by the reporter.

The first exception is that the indictment did not set out the means by which the conspiracy was to be executed. The point is

expressly decided in State *v.* Brady, 107 N. C. 822, where it is held, upon our own authorities, that a conspiracy to cheat and defraud need not charge the means to be used. Such was also the common law, as will be seen by reference to the English cases therein cited,—also citing Com. *v.* McKisson, 8 Serg. & R. 420, 11 Am. Dec. 630; 3 Greenl. Ev. § 95; and while stating that some States had held differently, this court decided to abide by our own and the English rule. The learned counsel from Illinois, who ably argued this exception for the defendants, admitted this, but, at great length, endeavored to persuade us to overrule our own decisions, contending that the weight of authority in this country was to the contrary. We think not, but if it were, that alone would not be sufficient to induce us to change, unless injustice was shown to follow from our decisions. In fact, however, the weight of authority in other States seems to uphold our ruling. Among many cases to like effect are State *v.* Noyes, 25 Vt. 415; State *v.* Bartlett, 30 Me. 132; State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719; Thomas *v.* People, 113 Ill. 531; State *v.* Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State *v.* Grant, 86 Iowa, 216, 53 N. W. 120; People *v.* Clark, 10 Mich. 310; 2 Bish. New Cr. Proc. 207 (2). Code Civ. Proc. § 259, provides, "The court may in all cases order a bill of particulars of the claim of either party to be furnished." In this case these particulars were fully furnished by the second and third counts, which were only nol-pros-d at the instance of the defendants, and after the close of the evidence, so that they were in full possession of all the information which a bill of particulars could have furnished them.

The next exception was for refusal of the motion to quash, "for that the allegations in the said bill of indictment, and in each and every count thereof, do not constitute a crime under the ordinance of conspirators, made and accorded by King Edward the First and his council in the thirty-third year of his reign, A. D. 1305, nor by any statutes in England since that date, nor under any common law in force in the State of North Carolina at the date of the said alleged offense." With reference to St. 33 Edw. I. "*De conspiratoribus*," Judge Councill charged the jury as follows: "Its existence can be traced back centuries prior to our independence, and such eminent ancient laww-riters as Coke, Hawkins, and others refer in their works to the existence of this crime prior to the passage of St. 33 Edw. I. '*De conspiratoribus*,' which statute has been commented upon by counsel for the defendants. Law-writers upon the
136 subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law." The cases sustaining his honor's view of the law of conspiracy are numerous,—among them, State *v.* Buchanan, 5 Har. & J. 317, 9 Am. Dec. 534, is an elaborate discussion of the question, covering 50 pages, and many authorities are cited. In this case, at page 333, 5 Har. & J., and at page 544, 9 Am. Dec., the court says: "Much reliance is placed on St. 33 Edw. I. '*De conspiratoribus*,' on the supposition that the offense of conspiracy was originally created by that statute." The learned

judge then proceeds to show (pages 333–351, 5 Har. & J., and pages 549–561, 9 Am. Dec.) that the offense of conspiracy existed prior to the passage of St. 33 Edw. I. (which was passed in 1304), and on page 351, 5 Har. & J., and page 561, 9 Am. Dec., observes: "By a course of decisions running through a space of more than 400 years, from the reign of Edward I. to the fifty-ninth year of George III., without a single conflicting adjudication, these points are clearly settled: (1) that the offense of conspiracy is of common-law origin, and not restricted or abridged by the statute 33 Edw. I.; (2) that a conspiracy to do any act that is criminal *per se* is an indictable offense at common law, for which it can scarcely be necessary to offer any authority." In State *v.* Burnham, 15 N. H. 396, Gilchrist, J., speaking for the court, says: "In the first place, we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury, and as deserving reprehension under one form of government as another." To the same effect are Com. *v.* Hunt, 45 Mass. 111, 38 Am. Dec. 346; State *v.* Pulle, 12 Minn. 164. In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers; and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offense, and therefore this court had no jurisdiction thereof." The supreme court held on appeal that conspiracy, not declared a crime by the statute law, was punishable because of the common law. In U. S. *v.* McCord (D. C.) 72 Fed. 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is." In 2 Bish. New Cr. Law, § 174, the statute of 33 Edw. I. is quoted in full, and the author adds, in subsection 2, the following: "Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before." In State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571, this court held that "a combination of two or more to do any unlawful act, or one prejudicial to another, is indictable at common law as a conspiracy." State *v.* Brady, 107 N. C. 822; State *v.* Powell, 121 N. C. 635; State *v.* Wilson, 121 N. C. 650.

The cases already cited dispose of the other exceptions for refusal to quash. Some of the authorities cited by defendants are no longer authorities, since the Code of 1883 added to section 1025 the second proviso thereof, that in indictments for false pretense "it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to de-

fraud any particular person, but it shall be sufficient to prove that the party accused did the act with intent to defraud."

The third exception is as follows: "While the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and impaneled, and during the trial of said cause. The solicitor, objecting, said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the court remarked that it was a matter of discretion with the court, and that all the witnesses, except the complaining witness, Garrett, and the high sheriff of the county, might be excluded from the court, but as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the other." It would, indeed, be sufficient to say that it does not appear that any one of the jurors who actually sat on the trial heard the remark, but we prefer to put our ruling upon broader ground. By the common law, judges were not prohibited from expressing an opinion upon the facts; and this is still true of the Federal courts, and all the States in which there is no statute making a change in this respect. In North Carolina the only change is that made by the act of 1796 (now Code § 413), which reads as follows: "No judge in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven." This is the extent of the statutory change. It goes no further. In State *v.* Angel, 29
137 N. C. 27, Ruffin, C. J., says: "The facts on which the act (1796) restrains him (the judge) from expressing an opinion to the jury are those respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendants depends." In State *v.* Laxton, 78 N. C. 564, Smith, C. J. says: "It is quite obvious from the words of the act that its special object was to prevent the intimation of such opinion in connection with, and constituting a part of, the instructions by which the jury were to be governed, and when its influence on their minds would be direct and effective." To same purport are De Berry *v.* Railroad Co., 100 N. C. 310; State *v.* Robertson, 86 N. C. 628; State *v.* Jones, 67 N. C. 285. These were cases in which the remarks were made by the judge during the progress of the trial, but it is not necessary that we pass upon the question whether the remark here made by the judge would be ground for setting aside the verdict if made during the progress of the trial, for it was not made at such time. At the time when made no juror had been selected, and the remark was not "to the jury," nor did it contain any opinion that "a fact was fully or sufficiently proven." No fact had been shown in evidence. The remark was not prohibited at common law, and is certainly not prohibited by any terms in the statute. No decision of our court has ever hinted that a statute forbidding the judge, "in a charge to the petit jury," from "expressing an opinion whether a fact is fully or sufficiently proven," extended to the remarks of a judge complimentary to one, who was afterwards

examined as a witness, made before the jury was selected or impaneled. In every case where such a proposition has been presented, this court has denied the application of the statute. State *v.* Jacobs, 106 N. C. 695; *id.*, 107 N. C. 774, 22 Am. St. Rep. 912; State *v.* Jackson, 112 N. C. 853.

The defendants except to the sentence imposed, of imprisonment in the penitentiary, but concede that this court has ruled otherwise in State *v.* Mallett, 125 N. C. 718, which we reaffirm.

The other exceptions are without merit, and were not seriously pressed in this court.

Affirmed.

MONTGOMERY, J., concurs in the conclusion reached by the court. He thinks, however, that what his honor said on the trial below, in declaring that two of the State's witnesses were of so high a personal character as that he would not ask them to leave the court-room, on a motion for the separation of the witnesses, and also what he said in his instructions to the jury in defending one of the same witnesses against the adverse criticisms of the defendants' counsel on the witness' testimony, was inappropriate and indiscreet. The language of the statute on the subject may not have been violated, but its spirit certainly was.

DOUGLAS, *J.*:

In dissenting from the opinion of the court, which I am constrained to do upon the highest considerations of private right and public policy, I feel much diffidence in expressing my own opinions, as they are so totally different from those of the court. However, they are the result of my deliberate judgment, and as such must find expression, as I cannot even silently concur in a decision which to me seems so dangerous in its tendencies, and so devoid of legal basis in its conclusions. I have no sympathy whatever for a gold-brick swindler, and but little for his victim, who is usually caught in the trap he thinks he has set for another. The ordinary business man has no earthly use for gold, except for what it will bring in the market, and no object in buying it unless he can resell at a higher price. Therefore he always expects to get it for less than its value from a supposed owner who must be ignorant of its value. He knows, or should know, that gold is current the world over, and that any one having it can carry or send it to the nearest mint and obtain its full value in current coin. Usually the pretended miner professes to be very ignorant, or has a partner who is even more ignorant than himself, and whose interests may be bought out at a small sum. In the case at bar the inducements offered Garrett appear to have been $25 per day and his expenses, together with a "one-third interest in everything he had," including $36,000 in gold at Greensboro, $48,000 in gold in Arizona, and a gold mine capable of producing $1,000,000 a year. In consideration for such great wealth, Garrett was to give his services only, and yet in his suit for a total breach of this contract he places his damages at the modest sum of $2,000. Again he says: "It was mighty pretty, and

I thought possibly there might be something in it. I may have been something of a phantom-chaser in this transaction." It would seem so. There is nothing in this case that appeals to my sympathies, and hence I am free to view it in its legal aspect. I believe that the defendants are all guilty, but this will not induce me to deny to them a single one of the rights which the law gives to them for their protection. I do not believe that the sole purpose of the law is to punish the guilty. A higher object still is the protection of the innocent. But, whether innocent or guilty, every citizen is entitled to a fair trial, and the equal protection of the laws. As was said by this court in State *v.* Keith, 63 N. C. 144: "These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate them, nor can any
138 court sitting on American soil sanction their violation." This case finds its counterpart in the great case of *Ex parte* Milligan, 4 Wall. 2, 18 L. ed. 281,—great in the court that decided it, great in the counsel who argued it, great in the ability of its opinions, and greater still in the principle it settled. Milligan was, before the close of the war, tried and convicted by a court-martial of conspiracy, followed by overt acts, to seize the Federal arsenals and set free and arm the Confederate prisoners. It was held by a unanimous court that he was entitled to a trial by jury according to the law of the land. The opinion of the court uses the following language on page 18, 4 Wall., and page 295, 18 L. ed.: "Had this tribunal the legal power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and, if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured. Withdraw that protection, and they are at the mercy of wicked rulers or the clamor of an excited people." In this spirit I approach the case at bar. The defendants may be guilty and deserve their sentence, but to deny them a fair trial would be — wrong, not to them alone, but greater still to the integrity of the law, in the preservation of which every citizen has the supremest interest.

To begin with, I am opposed to any further extension of the doctrine of conspiracies, which in this State has been already carried far beyond the danger line. The court seems to rely principally upon the cases of State *v.* Buchanan, 5 Har. & J. 317, 9 Am. Dec. 234; State *v.* Brady, 107 N. C. 822, and State *v.* Younger, 12 N. C. 357, 17 Am. Dec. 571. Buchanan's case is regarded as one of the leading cases, and will probably continue to be so regarded as long as judges, impressed with its apparent learning, take for granted its

citations. But I am free to say that the argument of the learned counsel for the defendants has convinced me that that case is not only inherently vicious upon its face, but is founded upon a large array of miscitations, and embellished with a vast amount of misinformation. For instance, that case holds "that an indictment will lie at common law for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only." What limit is there to such a definition, and what is meant by the word "immoral"? In its widest sense it might mean any act which in the opinion of the court was contrary to private morality or revealed religion. Can this be the law anywhere? Certainly not in this State, unless made so by Brady's case or that at bar. I do not think that Brady's case goes that far in that direction, but on another point it does go beyond any case within my knowledge. Without any citation of authority, and by some process of reasoning incomprehensible to me, it holds that the court below properly refused an instruction that, "though the representations might be false, if the defendants honestly entertained the opinion they were true, they would be not guilty." I can only say that such a ruling is, in my opinion, without foundation in law or justice, and I regret that it should be found in an opinion of this court. It is true, the court says that the "court properly refused them in the words asked;" but as the words themselves were objectionable, and the instruction does not appear to have been given in any words, the qualification of the court merely emphasizes the refusal. The opinion of the court before us cites Younger's case as holding that "a combination of two or more to do an unlawful act, or one prejudicial to another, is indictable at common law as a conspiracy." This is in the syllabus, but not in the case. What the court said was "that every conspiracy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy, and indictable." There is an essential difference between being prejudicial to the community and only to an individual. In that case the offense was a conspiracy to cheat by gambling, which was in itself unlawful. Younger's case is, moreover, in direct conflict with the opinion of the court as to the antiquity of the present doctrine of conspiracies, as in that case Chief Justice Taylor (perhaps more learned in the ancient common law than any judge who has ever sat upon this bench) says that "conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law."

But it may be said that the swindle which these parties contemplated was so clearly a crime that some of this discussion has no necessary application. Admitting that to be true, I am now discussing the opinion of the court. If it goes beyond the facts of this case, so must I. If it gives its unqualified approval to the cases of Buchanan and Brady, with all their inherent errors and vast possibilities of danger, then I must express my disapproval in terms equally plain; and, if any unguarded words of mine may appear too strong, I know my brethren will ascribe them to their true motive,—the strength of my convictions. The opinions of this court

are not mere decisions of pending cases. If they were, mere *per curiam* judgments would suffice, at least in cases of affirmation.

139 The real object of the opinion, as contradistinguished from the judgment, is to lay down general principles, as applied to a certain state of facts, for the determination of all future cases of similar nature. The mere character of the defendant does not affect the principle. It is only a gold-brick man today, but who may it be tomorrow? Among the general principles resulting from the opinion of the court and the cases it specifically approves are the following: That an indictment for conspiracy will lie at common law (1) "for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only;" (2) for "a combination of two or more to do any unlawful act, or one prejudicial to another" individual; (3) that "though the representations (relied on to convict) might be false, if the defendants honestly entertained the opinion they were true they would be * * * guilty." From these propositions of law I emphatically dissent. My own views as to the dangers attending the expansion of the doctrine of conspiracies cannot be better expressed than in the following words of Judge Campbell in delivering the opinion of the court in People *v.* Barkelow, 37 Mich. 455: "There is no class of cases where defendants are better entitled to the protection of the law against vague charges than where they are charged with conspiracy. The course of legal experience has shown this to have been a familiar resort to catch innocent persons by throwing a drag-net of vague charges, and resorting to suspicions and prejudices to induce juries to convict persons who find it impossible to escape the malicious insinuations of false accusers. Titus Oates' plot has been a warning to all courts and jurists not to encourage any looseness in charges which in exciting times jurists and communities are only too ready to catch at to punish those who are unfortunate enough to be suspected." This opinion, concurred in, amongst others, by Judge Cooley, shows not only the great learning and clear comprehension of the present of those eminent jurists, but also their prophetic grasp of the possibilities of the future. A few years later the English doctrine found its legitimate outcome in Reg. *v.* Parnell, 14 Cox, Cr. Cas. 508, where the great Irish leader, with others, was indicted for a conspiracy to impoverish owners of land in Ireland by soliciting their tenants not to pay rent. Lord Fitzgerald, in summing up the case to the jury, said that it was plain and clear that an agreement of two or more persons to commit any wrongful act was an indictable offense. "If," said he, "a tenant withholds his rent, that is a violation of the right of the landlord to receive it, but it would not be a criminal act in the tenant, though it would be in the violation of a right; but, if two or more incite him to do that act, their agreement so to incite him is, by the law of the land, an offense." Is not this equivalent to saying that a bare agreement of two persons to break a simple contract, or to induce another one to do so, is a crime? I do not suppose that any one will deny that the indictment of Parnell was purely for political reasons, and, if the English rule prevails in this State, what is there

to prevent the indictment of the members of our usual labor organizations?

I am further of the opinion that the first count in the indictment, on which alone the defendants were tried, is not sufficient either to put them upon their guard, or to furnish the basis for the future defense of former conviction or acquittal. Again the English rule is invoked, but there a bill of particulars is granted practically as a matter of course. The court in its opinion cites section 259 of the Code, to the effect that "the court may in all cases order a bill of particulars of the claim of either party to be furnished." If this section applies to criminal actions, which I doubt, it cannot help this case, because the judge refused the request. Whatever might have been the effect of a bill of particulars if it had been furnished, surely the refusal of the court to grant it cannot validate an indictment insufficient in itself. But, again, the court says that the solicitor for the State need not have elected between the counts; but he did elect, and nol-pros-d all but the first count. Those counts are therefore as much out of the indictment as if they had never been in it. But the opinion says that the second and third counts gave the defendants the information they desired. Can it be that a defendant is required to go to a bill of indictment that has been nol-pros-d to find out the meaning of the bill on which he is tried? I am aware of the line of decisions that it is not necessary to set out the particular means by which the cheating was to be accomplished,—that is, the indictment need not state each particular act or false pretense upon which the State relied, because this would be impracticable; but it must set out enough to constitute a crime, and to identify that particular crime with reasonable certainty. Suppose an indictment were to charge simply that John Smith did in the year 1900, in the county of Wake, attempt to steal from William Jones; would any one suppose that Smith could be convicted? Again, suppose that Smith was indicted for attempting to burn a barn in the year 1900, and in the county of Wake; could he be tried for attempting to burn any or all of the numerous barns in Wake county that may have been in existence during the year 1900, or any other year, within the legal radius thereof? But, forsooth, if Smith is indicted for conspiracy to burn some indefinite barn, without burning or attempting to burn any barn whatever, then nothing more need be said. If such is the law, then I am ignorant of the law.

There are several errors which, for want of time, I must pass over, or notice only in the briefest possible manner.

I think the admission in evidence against Hawley of the
140 card bearing his name was fatal error. This card was found in Howard's possession after his arrest. There is no evidence that it was ever in Hawley's possession, and no suggestion that it is in his handwriting. When shown to him, he denied all knowledge of it. It might as well have borne the name of any prominent citizen of Greensboro, or State official. Would it then have been evidence against any one? If not, why should it have been evidence

against Hawley? The majesty of the law is such that the loftiest are within its reach, and the lowliest within its protection.

Passing over other points, I come now to two errors, similar in nature, but occurring at different stages of the trial, either one of which is sufficient to entitle the defendants to a new trial, and the combination of which renders it morally impossible that they should have had such a trial as they are entitled to by "the law of the land."

The record shows that after the case had been called for trial, and the defendants had pleaded not guilty, and while the regular panel of jurors was in the court-room, the defendants moved to separate the witnesses and to exclude them from the court-room while said jury was being selected and impaneled, and during the trial of said cause. The solicitor, objecting, said that the witness Paul Garrett would be the first witness examined, and the others would testify as to matters not in his knowledge, except the detection in Greensboro. Whereupon the court remarked "that it was a matter of discretion with the court, and that all the witnesses, except the complaining witness, Garrett, and the high sheriff of the county, might be excluded from the court, but, as to these witnesses, their high character as citizens forbade the idea that either of them would be influenced by the testimony of the others." This remarkable statement of fact by his honor was made in the presence of the jury, after the case had been called for trial, and in passing upon a motion in the action. It was not necessary, as he could have refused the motion, in his discretion, without giving any reason, or he might have given the reason suggested by the solicitor, which would have been harmless. His testimony to the high character of Garrett could not have been stronger even if he had been a witness; and can we suppose that the jury would not be influenced by such a statement, coming from the judge, as to the character of a witness personally unknown to them? Taken in connection with his subsequent charge,—and the jury must have connected the two,—its practical effect was to withdraw from their consideration the credibility of a witness whose testimony was absolutely essential to the prosecution. The opinion suggests that the jury may not have heard the remark. Such a suggestion comes from the court alone. The evident gist of the exception is that the remarks were made in the presence of the jury, and were calculated to influence them. The attorney general, in his able brief for the State, says: "It is conceded by the defendants in their third assignment of error that 'these remarks of his honor were made before the jury was passed upon by either the State or defendants, but when the regular panel was present in the court-room; *in the jury-box.*'" The italics are mine. He never for a moment suggests that they were beyond the hearing of the court, but proceeds to argue that the defendants' remedy was to "have taken steps looking to the elimination of such jurors as might have been affected by the remarks of his honor." The opinion refers to the English rule permitting judges to express an opinion upon the facts, but this rule has long ceased to prevail in this country. Even where it still lingers, it is coupled with the obligation upon the

judge to instruct the jury that they are not bound by his opinion of the facts. The general rule is thus clearly stated in 11 Enc. Pl. & Prac. 97: "As stated in a preceding section, the practice in most States forbids any expression of opinion as to the weight and sufficiency of the evidence; and the rule, as will be subsequently shown, is most stringently enforced. Not infrequently judges evinced partisanship in their charges, and molded verdicts to their will; and juries as frequently shirked responsibility, and really adopted the opinion of the judge, finding their verdict as he directed. It was to put a stop to this, and to secure the constitutional right of trial by a jury, and not by a judge, that the various limitations upon this common-law power were imposed by the constitution or by statutes. The trend of modern action, both legislative and judicial, is to watch over and protect very jealously the legitimate powers of the jury, and to prevent the court from overstepping the line which separates law from fact. 'Trial judges cannot legally indicate their opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact at issue, and the subject of the evidence.'" In support of this rule five or six hundred cases are cited, of which twenty are from this State. The common-law rule was expressly abrogated in this State by the act of 1796 (now Code, § 413), which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury." From the first this statute has been uniformly given a liberal interpretation, in order to carry out its essential principles; but now, for the first time, this court proposes to overrule the settled policy of a hundred years, and adhere to the exact letter of the law. This necessarily involves overruling numerous decided cases,—amongst others those of Reel's Ex'rs *v.* Reel, 9 N. C. 63; State *v.* Dick,
141 60 N. C. 440, 86 Am. Dec. 439; Willey *v.* Gatling, 70 N. C. 410; MacRae *v.* Lawrence, 75 N. C. 289; Crutchfield *v.* Railroad Co., 76 N. C. 320; State *v.* Dancy, 78 N. C. 437; State *v.* Jenkins, 85 N. C. 544. There are numerous other cases enunciating the same principle, but I have cited those only in which a new trial was granted. In all of these cases a new trial was ordered, although none of them came within the letter of the statute, inasmuch as the judge did not "give an opinion whether a fact is fully or sufficiently proven." In some of them he was not even addressing the jury, as in Dick's case. In that case this court says: "On the trial a question arose as to the withdrawal of certain confessions of the prisoner. The court declined withdrawing them, but remarked to the solicitor for the State that, after the other evidence already given in the cause, he (the solicitor) might withdraw them, if he chose to do so, which the solicitor declined. This seems to us an expression of opinion on the part of the judge that the case was sufficiently proved without the aid of the confessions. This is not directly asserted, but is a matter of inference, plainly, from the manner in which the expedient of withdrawing the testimony is suggested. * * * The object (of the statute) is not to inform the jury of their province, but to

guard them against any invasion of it. The division of our courts of record into two departments, the one for the judging of the law, the other for judging of the facts, is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the legislature intended to furnish, but their purpose was to lay down an inflexible rule of practice,—that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. * * * This, we suppose, has been to maintain undisturbed and inviolate that popular arbiter of rights, the trial by jury, which was, without some such provision, constantly in danger from the will of the judge acting upon men mostly passive in their natures, and disposed to shift off responsibility, and in danger, also, from the ever-active principle that power is always stealing from the many to the few." The court has said in State *v.* Davis, 15 N. C. 612, speaking by Gaston, J.: "It is obvious that, if we confine ourselves to the words of this statute (act 1796), there is no ground for the complaint which we are now considering. But it has been long since settled that the literal is not the true interpretation of the act. Solicitous to discover and faithfully to carry into execution the legislative will, this court has fixed its *in*tention upon the purposes declared in the act, and has given to it such a construction as, it believed, would most effectually accomplish these purposes. * * * But if in doing all this he (the judge) intimates his individual opinion as to the existence or non-existence of a controverted fact, on which side of the controversy he believes the truth to be, or which of the witnesses he regards as having the higher claims to respect for his accuracy and probity, he overleaps the boundary of duty, and invades the peculiar and exclusive province of the jury." This court has said in State *v.* Jones, 67 N. C. 285: "This (the statute) has been held to mean that the judge shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of the evidence. This construction, in the last particular, goes beyond the words of the act, but it is accepted as a proper one." In State *v.* Dixon, 75 N. C. 275, this court has said: "This statute is but in affirmance of the constitution (article 1, §§ 13–17), and the well-settled principles of the common law as set forth in *Magna Charta*. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court, tending to influence them into a verdict against their convictions, is irregular and without the warrant of law." In Crutchfield *v.* Railroad Co., 76 N. C. 320, this court granted a *venire de novo* because the judge below, in his charge to the jury, said that "it was not denied but that Dr. Bahnsen was a gentleman of unquestionably high character in his profession, and that he appeared to be a gentleman of culture." In that case the court says on page 324: "Nor does it matter if his honor was (if he was) speaking of another part of Dr. Bahnsen's testimony, when he put his estimate upon him as a physician of high character and a gentleman of culture. That was the mark put upon the man, and

it attached to every part of his testimony. A judge ought not to state to the jury his estimate of a witness, or how he appears to him." In MacRae *v.* Lawrence, 75 N. C. 239, a new trial was granted by this court because the judge below, referring to two witnesses whose testimony was conflicting, charged the jury "that both the witnesses were gentlemen, and that it was a pure matter of memory." This court, holding that such an expression was fatal error, says: "Again, one of two witness, where they differ, may be corrupt. And the party against whom his evidence is may so insist before the jury, and his honor cannot tell the jury that he is not corrupt, but that he is a 'gentleman.'" If it is fatal error for the court to tell the jury that the principal witnesses on each side are both gentlemen, how much greater error is it for the judge to single out the prosecuting witness alone, and say that he is a gentleman of such high character that his veracity must not be questioned! But it is said that this remark was made before the jury was impaneled. With all due respect for the court, this seems to me the purest technicality. If it is not *hærens in cortice*, it is because it does not
142 reach the inner bark. It is true, the jury had not been impaneled, but the case had been called for trial, and the regular venire was in the jury-box. The remark was not a mere "passing compliment," but a statement of fact upon which his honor based his ruling on a motion in the action itself. It did all the harm it could have done if it had been in the charge, and is clearly in violation of the act which this court has repeatedly said, in substance, confers no new right, but is simply in affirmance of the constitution of this State, and the principles laid down in *Magna Charta*. And yet it is proposed to overrule so many cases, and establish so dangerous a precedent, upon an immaterial ruling in Jacobs' case, sustained by a mere dictum in Jackson's. Let us examine those cases. When Jacobs' case was here, in 107 N. C. 772, 22 Am. St. Rep. 912, no allusion whatever was made to the point before us. When the case was first here (106 N. C. 695), the court says: "It is difficult to see how the remark of the judge (that he had been informed by the jailer that he apprehended that Jacobs would escape if he had the opportunity) violated any provision of this statute. No juror had been selected, the remark was not in the presence of the jury, nor did it contain any opinion that 'a fact was fully or sufficiently proved.' No facts had been shown in evidence. Indeed, had the jury been impaneled, the statute prohibited the judge 'from expressing an opinion only upon those facts respecting which the parties take issue or dispute, and on which, as having occurred or not occurred, the imputed liability of the defendant depends.'" If the remark was not made in the presence of the jury, and would not have been improper even if the jury had been impaneled, what difference did it make whether the jury was impaneled or not? In Jackson's case, 112 N. C. 851, the objectionable remark was made, not by the judge, but only by a bystander, and yet the opinion proceeds to say that "remarks made by the judge on such motions do not come within the prohibition of the statute;" citing State *v.* Jacobs, 106 N. C. 695. As the judge had made no remark whatever, this

was a pure dictum. And yet these two are the only cases which are even claimed to furnish any authority for the position of the court.'

I come now to the last exceptions that I shall discuss. These two exceptions are addressed to the following portion of his honor's charge: "Reference has been made by counsel for the defense to the testimony of the witness Garrett, and his course in connection with the apprehension and arrest of the defendants in connection with this charge, and has been made the subject of comment and criticism. The court therefore takes occasion to say that if the evidence, as disclosed by the testimony of Garrett, satisfies you that he acted in the matter either for the purpose of detecting the defendants, having suspected them of an intention to cheat and defraud him, or if he acted under the belief that the representations and inducements held out to him were honest and true, and that in consequence of either of these beliefs he came to Greensboro to ascertain the truth of such impressions, then he acted within the provisions of the law, and his course is not the proper subject of criticism or adverse comment. The court, in this connection, charges you that there is no evidence that in any way connects him with the defendants in any charge of conspiracy to violate the law. If he comes to detect and apprehend the defendants in the commission of an intended crime, his course is not only proper, but is commendable. If he came under the impression that the business transaction was a legitimate and honest one, by means of which he would be able to acquire legitimate and honest profit, then he had a right to come for such purpose, and it would not be a subject of criticism." His honor apparently proceeded upon the assumption that there were only two possible constructions to place upon Garrett's conduct,—either that his purpose was to detect crime, or to engage in a legitimate business enterprise,—one of which was proper, and the other commendable. No other hypothesis seems to have entered his honor's mind, or to have been left to the jury. Taken in connection with his previous ruling as to Garrett's high character, what was left for the jury, except to convict? If they believed Garrett, they must find at least two of the defendants guilty,—Howard and Daley. Without Garrett, they could find no one guilty. The defendants did not introduce any testimony, but relied upon their legal presumption of innocence. If they could impeach Garrett, they would be acquitted, and this they attempted to do by a rigid cross-examination. Whether they succeeded was for the jury alone to say, without any intimation whatever from his honor as to the weight of the evidence or the credibility of the witnesses. The parts of Garrett's testimony relied upon by the defendants for his impeachment are thus set out in their brief: Garrett, a man of wealth, is approached by defendant Howard, and has laid before him a proposition to take him into partnership in a gold mine, with immediate compensation for a time at $25 per day and expenses, and incidentally the probable purchase by him (Garrett) of some $12,000 worth of gold. Howard at this interview exhibited a large roll of bills, and paid Garrett $10 on account. Garrett accepted this money, and Howard left the office, having appointed a rendezvous two days later at Greensboro.

Garrett testified that at this interview he made up his mind Howard was a confidence man, and, as the latter crossed the street on leaving Garrett's office, Garrett pointed him out to two of his em-
143 ployés, with the remark, "If you want to see a genuine gold-brick man, look out of the window quick." His faith in Howard was so small that he even suspected the $10 bill paid him to be counterfeit. What, then, was the duty of Garrett when his mind first reached the conclusion that Howard was a confidence man,—a "gold-brick man"? Clearly, it was to order him out of his office, with a threat to denounce him to the authorities. He might well have gone farther. He might have informed the sheriff or the police of his interview and of his suspicions, leaving to them the duty of dealing with Howard and the others. What he did was to put himself into communication with the chief of police at Richmond, Va. He wrote a long letter to Patterson, accompanying it with a letter of introduction of Mims from Lewis. All this was to lay an elaborate plan to apprehend the defendants, for whom, by the way, he believed there was a reward outstanding of $20,000. He then gave his letters to Mims; and so solicitous was he that there should be no failure of justice, and, incidentally, that he should not fail of the reward, that he gave Mims $20 or $25 for expenses. Thus, his arrangement for arrest having been completed, he set about enticing defendants into a completion of the supposed objects of the conspiracy. He had previously, at his first interview with Howard, so far fallen in with Howard's plans as to make two drafts of a telegram,—one to use if the Indian were amenable, the other in the event he were not. On the second day after the interview with Howard, Garrett proceeded to Greensboro to keep the appointment. On arrival he saw Mims and Patterson, to whom for 30 minutes he talked "pretty plainly," and was told that the sheriff had the matter in charge. There, also, he met Howard, and, after he counted Howard's money for him, the two drove out in a buggy to the place where the Indian was camped. On this drive Howard showed signs of backing out, but Garrett urged him on,—not once but several times. The sheriff and Patterson passed them on the road. Howard thought they looked suspicious, but Garrett, mindful of his civic duty and the reward, and the roll of bills he had just counted, ridiculed the notion. The sheriff and Patterson were "just two fellows that had been downtown and got drunk." Again, Garrett said, "The next time you stop, I am going to take the horse and buggy and go back to town." When they arrived at the Indian's camp, Garrett suggested that Howard tell the Indian that he (Garrett) was Andrew Garrett's brother. "You tell him I'm Andrew Garrett's brother." The alleged gold bars were then produced, and just as the weighing was completed the officers closed in and arrested Howard and Daley. This successfully completed the first half of Garrett's plan. In Com. *v.* Leeds, 9 Phila. 569, which was a case where certain parties induced a saloon-keeper to sell them beer in violation of the Sunday liquor law, for the purpose of informing on him, Judge Paxson said: "For the relators it was urged that they were engaged in a lawful object, to wit, the enforcement of the

Sunday liquor law. * * * It was never intended that a man should violate the law in order to vindicate the law. * * *" Immediately after the returning from the scene of arrest, Garrett went to the office of King & Kimball, attorneys-at-law, and retained them to appear in the criminal prosecution, and, also being still mindful of his civic duty, to prosecute a civil suit for $2,000 against these defendants for an alleged breach of contract. In aid of this suit he caused an attachment to be levied on the clothes, trunks, jewelry, and other personal effects, including the roll of bills displayed by Howard at their first interview, and which he had kindly counted for Howard at Greensboro just before the arrest. Having secured everything in sight, even to their changes of underwear, this good citizen leaves the State of North Carolina to pay the expenses of defendants in this suit, by compelling them to defend *in forma pauperorum* Upon this review of the testimony of the prosecuting witness, as relied upon by the defendants, it seems to me clear that his honor committed fatal error in his charge, and that a new trial should be granted.

I have given much attention to this case,—more than my official duties would justly allow, and much more than the defendants apparently deserve; but I am firmly convinced that there is nothing more dangerous than to attempt to stretch established principles to meet the supposed exigencies of particular cases. I cannot do better than close this opinion with the words of Chief Justice Chase in the concurring opinion in *Ex parte* Milligan, 4 Wall. 2, 132, 18 L. ed. 281, 299, as follows: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But, whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even upon the guilty unauthorized, though merited, justice."

FURCHES, *C. J.* (dissenting):

Without affirming all that is said by my brother Douglas in the elaborate and learned discussion in his dissenting opinion, I cannot say that I am satisfied that the defendants have had a fair trial. In my opinion, there is error, at least, in what the judge said as to Garrett's high character on the motion to separate the witnesses, and in what he said near the close of his charge to the jury,—that Garrett's conduct was not a proper subject for unfriendly comment. In my opinion there should be a new trial.

144 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Guilford county:—upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court as delivered by the Honorable Walter Clark, justice, be certified to the said superior court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this court incurred, to wit, the sum of forty-six $\frac{80}{100}$ dollars ($46.80), and execution issue therefor.

145 The Supreme Court of North Carolina.

I, Thomas S. Kenan, clerk of the supreme court of North Carolina, do hereby certify the foregoing to be a full, true and correct transcript of the record on file in this court in an action entitled "State of North Carolina against J. L. Howard, alias Frank Thompson, A. L. Daley, alias Gonez Bono and H. D. Hawley."

In witness whereof I have hereto set my hand and affixed the seal of said court at office, in Raleigh, this 26th day of March, 1902.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of Supreme Court of North Carolina.

146 In the Supreme Court of the United States, October Term, 1901.

J. L. Howard, A. L. Daley, and H. D. Hawley, Plaintiffs in Error, *v.* State of North Carolina, Defendant in Error.	Writ of Error to the Supreme Court of North Carolina.
J. L. Howard, A. L. Daley, and H. D. Hawley, Appellants, *v.* J. M. Fleming, Warden, etc., Appellee.	Appeal from the United States Circuit Court for the Eastern District of North Carolina.

It is hereby stipulated and agreed, on behalf of the State of North Carolina, that, in the record in the case of Howard *et al. v.* The State of North Carolina, in the Supreme Court of the United States, the same being the record of the writ of error to the supreme court of North Carolina, the statement of case on appeal in the supreme court of North Carolina may be omitted in the printing; and reference may be had for such record from the record in the said Supreme Court of the United States in said writ of error to the

record in the said Supreme Court of the United States of the appeal from the circuit court of the United States in the *habeas corpus* case, involving the same parties; it being the intention of this stipulation that the cost of twice printing said statement of case filed in the supreme court of North Carolina, involving these appellants and plaintiffs in error, may be av-ided; and that said record shall be printed only once and that in the appeal from the said circuit court of the United States.

ROB'T D. GILMER,
Attorney General for the State of North Carolina.
LESLIE A. GILMORE &
FRANK P. BLAIR,
Attorneys for Appellants and Plaintiffs in Error.

147 [Endorsed:] File No. 18512. Supreme Court U. S., October term, 1901. Term No. 313. J. L. Howard *et al.*, p'ffs in error, *vs.* The State of North Carolina. Stipulation to omit part of record in printing. Filed Ap'l 12, 1902.

Endorsed on cover: File No. 18,512. North Carolina supreme court. Term No. 313. J. L. Howard, *alias* Frank Thompson; A. L. Daly, *alias* Gonez Bono, and H. D. Hawley, plaintiffs in error, *vs.* The State of North Carolina. Filed April 23rd, 1902.